Tann Electric *and* International Brotherhood of Electrical Workers, Local No. 124. Case 17–CA–17811

August 11, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On May 23, 1997, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions except as modified below.

The General Counsel has excepted to the judge's failure to find 8(a)(3) and (1) violations based on the Respondent's changing its hiring policies and practices in 1994 and 1995, purportedly for the purpose of excluding union applicants. In particular, the General Counsel cites the Respondent's new policies of ceasing to advertise for employees, ceasing to accept new applications from persons unknown to it and, instead, inviting updated applications or resumes from applicants in years past or inviting an application from a person informally referred to it after a job vacancy occurred. The General Counsel argues that evidence of the Respondent's animus and its failure to supply any neutral explanation for these policies establish that they were discriminatorily motivated.

The January 8, 1997 amended complaint, which issued shortly before the hearing in this case, alleges that the Respondent interrogated applicants for employment concerning their union membership and refused to consider or hire certain named applicants since about July 23 and August 29, 1994, and July 22, 1996. In addition, and as pertinent to the issues raised by the General Counsel in the exceptions, this complaint specifically alleges in paragraph 6(d) that:

> (d) Since at least July 22, 1996, Respondent established, maintained, and applied to the employee applicants [of July 26, 1966] a hiring policy and practice that screened employee applicants to uncover suspected union supporters.

In affirming the judge's dismissal, we find that the above-referenced policy changes by the Respondent in 1994 and 1995 were neither placed in issue by the amended complaint nor raised by the General Counsel at the hearing. Consequently, the Respondent was never properly apprised of any necessity for defending or explaining any changes to its hiring policies or practices at any time prior to July 1996. Accordingly, we find that the lawfulness of the changes the Respondent implemented in its application processes in 1994 and 1995 was neither properly alleged nor litigated, and we affirm the judge's refusal to find any violation based on those changes.

The General Counsel also excepts to the judge's failure to make findings on the Respondent's alleged refusal to hire five applicants—Kevin McConnell, Allan Ward, Harvey Henry, Clint Klinge, and Frank Matthews. On May 11, 2000, the Board issued its decision in *FES*, 331 NLRB No. 20 (2000), setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. This case will be remanded to the judge for further consideration of the refusal-to-hire allegations in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.[2]

ORDER

This proceeding is remanded to Administrative Law Judge George Carson II for further consideration under the *FES* framework, and reopening of the record if necessary, concerning the question whether the Respondent discriminatorily refused to hire alleged discriminatees Kevin McConnell, Allan Ward, Harvey Henry, Clint Klinge, and Frank Matthews. The judge shall determine an appropriate remedy if he should find any violation with respect to these five individuals.

Thereafter, pursuant to the applicable provisions of Section 102.45(a) of the Board's Rules and Regulations, the judge shall prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended Order with regard to the issue remanded here. Following service of this Supplemental Decision and Order on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

The issuance by the Board of an Order remedying the unfair labor practices found in this proceeding is held in abeyance pending completion of the action encompassed by this remand.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge's finding that McConnell, Ward, Henry, Klinge, and Matthews were unlawfully denied consideration on the basis of evidence comports with the standard set forth in *FES*. Remand of his refusal-to-consider findings is therefore unnecessary.

Lyn R. Buckley, Esq., for the General Counsel.
Stanley E. Craven, Esq., of Kansas City, Missouri, for the Respondent.
Mr. James Beem, of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Overland Park, Kansas, on January 21 and 22, 1997. The charge was filed on January 23, 1995, and thereafter was amended on March 8, 1995, and January 8, 1997.[1] The amended complaint was issued on January 8, 1997. The complaint alleges one instance of interrogation and the promulgation and maintenance of a discriminatory hiring policy in violation of Section 8(a)(1) of the National Labor Relations Act (the Act), and the failure to consider for hire and to hire approximately 23 applicants in violation of Section 8(a)(3) of the Act. Respondent's answer, as amended, denies any violation of the Act.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is in the business of providing commercial, residential, and industrial electrical services from its facility in Mission, Kansas, where it annually performs services valued in excess of $50,000 in States other than the State of Kansas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The answer admits, and I find and conclude, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

John Tann established Tann Electric in Mission, Kansas, a suburb of Kansas City, in 1991. Prior to this he had been in charge of the Denver, Colorado, operations of McBride Electric, a service electrical contractor. Initially, Tann was the only employee of Tann Electric. As he began to expand his business, he continued various practices that he had used in Denver, including "screening the market." Tann described this as advertising for electricians, even though he did not need a new employee, at times when he knew the city was not busy. He wanted applicants who were short on time with their current employer, stating that he hoped to get a higher quality of applicants. Although Respondent did not necessarily have any openings when "screening the market," if a really outstanding applicant applied "we might create an opening." Tann ceased the practice of "screening the market" after August 1994.

When Tann had an actual vacancy, he did not, on a regular basis, review prior applications. Rather, he would typically offer the vacant position to a current applicant. Nevertheless, on occasion he has sought out applicants who had applied and been interviewed in the past, but who had been denied employment due to the absence of a position. As of November 8, 1995, he ceased taking applications when he did not have job openings.

The Union sent members to Tann's offices on May 2 and August 29. On both of these occasions the members were permitted to fill out applications. Thereafter, on July 22, 1996, a group of four union applicants was advised that Tann did not take applications when there were no job openings.

Tann acknowledges that he operates a nonunion company, although he has hired union members. He admits that he did not consider the 15 union member applicants who applied for work in response to a "screening the market" advertisement in May 1994. There is no evidence of any vacancy at that time. He also did not consider the five union member applicants who applied for work in response to a similar advertisement in August 1994. There was one vacancy at that time. There were no vacancies in July 1996 and, at that time, Respondent had ceased to accept applications when it had no job openings.

B. Facts

On May 1 the following advertisement appeared in the Kansas City Star:

> ELECTRICIAN
>
> 4+ years of experience a plus. Good benefits. Challenging work. Call 236-7349 or send resume to: Tann Electric, 6750 W. 47th Terr., Mission, KS 66203.

On May 2, union electrician, Kevin McConnell, responded to the advertisement by going to the address given in the advertisement. He arrived sometime between 8 and 9 a.m., completed an application, and left approximately 6 minutes after the union electricians who applied in a group arrived. The application reflects completion of IBEW Local No. 124 apprentice training in 1980. Thereafter, on May 5, McConnell was interviewed by Tann who wrote "probably would hire" on the application.

At 9:31 a.m. on May 2, a group of union electricians exited from a door at the IBEW Local No. 124 union hall in single file, stating their names as they passed by a video camera. Thereafter, the videotape records the members going up the stairs to Tann Electric's offices at 10:06 a.m.[4] There were 18 union electricians in the group at Respondent's offices. Three of these electricians, Lindle Lee, Danny Melloway, and Chris Heegan, did not fill out applications. Rather, they served as spokespersons for the group.[5] No individual applicant identified himself. Indeed, the spokespersons did not immediately identify themselves. After confirming that they were at Tann Electric,

[1] All dates are 1994 unless otherwise indicated.

[2] The initial complaint issued on February 15, 1996. An oral amendment to the amended complaint and Respondent's orally amended answer were allowed at the hearing.

[3] GC Exh. 6B, a compilation showing all additions and deletions from Respondent's payroll during the relevant period, was, by agreement of the parties, submitted after the hearing closed. It is, without object, received.

[4] The parties stipulated that the videotape accurately depicted what was shown and heard thereon. Upon its admission into evidence, it was viewed at the hearing.

[5] Applications were submitted by Dale Allen, James Beem, Eric Brockus, Jonathan Doughty, Mark Dreiling, Thomas Howard, Raymond Hurst, Dennis Liston, Greg Logan, Matt Mapes, William Petrie, Chad Reynolds, Ralph Rodriguez, Robert Roosevelt, and Joel Womack.

one of the spokespersons requested applications for the group from the two clerical employees who were present. One of the clerical employees asked, "All of you?" She was advised that about 15 or 16 application forms would be needed. Spokesperson Danny Melloway was operating the video camera. Shortly after the group received their applications, Melloway was asked by one of the clerical employees, who was identified at the hearing as Hannah, what he was holding. He replied that it was a "recorder," that was to "document what we're doing." He did not state that he was operating a video camera.[6] At 10:14 a.m. building owner, Jim Lewis, arrived and requested that the video camera be turned off. The operator of the camera refused, and Lewis called the police.

Tanya, the other clerical employee, called Tann shortly after the group arrived. She informed him that there was a group in the office with a video camera, and that they had been told to put it away but would not do so. The tape shows the applicants beginning to fill out their applications, but it also often follows the clerical employees as they move around the office. It records the clerical identified as Tanya on the telephone in an office adjacent to the main reception area. Various questions and comments are addressed to the clerical employees by the spokespersons, including a comment that one "is going to be a movie star." The clericals, not the applicants, are being videotaped on these occasions. At 10:18 a.m. the two clerical employees were together at the desk. One of the union spokespersons asked if they had a problem with the applicants being "Union." Hannah replied that she just had a problem being videotaped without her permission. Notwithstanding this comment, Melloway continued to record her on the videotape. At 10:20 a.m. the video camera was handed to applicant Matt Mapes who commented that Melloway, who had been operating the camera, might not be there much longer since the police had been called. Mapes recorded the presence of Melloway and Lindle Lee and returned the camera to Melloway. At 10:25 a.m. a police officer arrived. He discussed the situation with Lewis and the three union spokespersons. Melloway stated that he would turn off the video as soon as "that guy," referring to union spokesperson Lindle Lee, "says so." Melloway also stated that he was only taping the applicants in the application process. Review of the tape establishes that this was untrue.[7] At 10:30 a.m. the officer asked that the video camera be turned off. His request was ignored. One of the union spokespersons asked if he was "ordering" that the camera be turned off. The officer again indicated that he was asking, "real nice," that the taping cease. It continued. The applicants left the office at 10:37 a.m.. The camera was still running.[8]

After the taping incident, Tann spoke with Building Owner Lewis and his clerical employees who reported that they felt harassed. Tann acknowledged that he was upset that the group had harassed his employees. On the morning of May 3, Tann expressed to employee Paul Richey that he felt very strongly about the group that had entered the offices the previous day. He mentioned their union affiliation and stated that he was concerned that they would not work according to his rules.[9]

Despite being upset about the behavior of the group on May 2, Tann interviewed McConnell and one of the applicants in the group, William Petrie. On May 13, when interviewing Petrie, Tann again alluded to a need to work by his rules, stating that, in the service business, the hours worked did not conform to union guidelines. He commented that service "can't be done between the normal hours," that he had to respond to customers at nights and on weekends. When Petrie stated that he was interested in talking to the men to see "if they'd like to join the Union," Tann responded that he did not think that was a good idea because the hours worked did not confirm to union guidelines and that a marriage between Tann Electric and a union would be a problem.[10]

After thinking about what had happened on May 2, Tann decided that he did not "want to employ anybody that would go out and . . . be insubordinate to me or to my customers in the manner in which . . . they behaved themselves at that time."

There is no evidence of any vacancy on May 2, which is prior to the 10(b) period. Shortly before the 10(b) date, July 23, 1994, Respondent had five electricians on its payroll: Ron Jarrett, Dennis Ruegsegger, Jason Neal, Paul Richey, and Paul Drummond. Respondent also employed two shopmen, Kelly Gann and Frank Waterman. Electrician Drummond ceased to be employed and does not appear on the payroll for the period ending July 24. Thereafter, Respondent sought to obtain a fifth electrician. In early August, Respondent hired Dan Lehane, but he could not do the work and was terminated on August 15. Brent Parks also worked for less than 2 weeks in August; there is no evidence of the actual dates of his brief employment.

In August, James Beem, the Union's director of organizing, asked David Johnson, who at that time was not a member of the Union, to apply for work at Tann. Johnson was employed at Westhues Electric. Johnson applied on August 23. He was interviewed on August 29. At this interview, Tann discussed with Johnson his experience, including working at Guy's Foods, a company that performed work similar to that performed by a company in Denver with which Tann was familiar. Johnson's application reflects that he had electrical training through the ABC program at Pioneer College. Apprentices in the ABC program typically work for nonunion contractors, and Johnson's participation in this program was discussed. I do not credit Johnson's testimony that he showed Tann his ABC card in response to a question as to whether he was a member of a union. In a pretrial affidavit, Johnson stated only that, "I think he asked me if I was union." Tann denied asking about any union affiliation, and I credit his testimony. Insofar as ABC apprentices usually work for nonunion contractors, there would be no need for such a question since the application clearly reveals Johnson's ABC training.

[6] If the clerical's response of "OK" be deemed permission to videotape, that permission was clearly revoked when she later stated that she did not wish to be videotaped.

[7] As already noted, on various occasions the camera follows the movements of the clerical employees as they made telephone calls, responded to questions, and performed other office functions.

[8] Following the viewing at the hearing, I noted on the record that there was no loud talking, profanity, pushing or shoving, but that the request of three separate persons to cease videotaping was not honored. I reviewed the videotape again in preparation for writing this decision. I consider the clerical Hannah's statement that she had a problem being videotaped without her permission to be a request to cease the conduct that she found offensive. Thus, I continue to adhere to the observations I made at the hearing.

[9] Richey acknowledged that he had not tried to remember this conversation "from a long time ago." He recalled "the thing that stuck out" was that Tann said detrimental things about the group of people who applied on May 2. I credit his testimony only to the extent noted above.

[10] This cautioning against engaging in lawful solicitation occurred prior to the 10(b) date, but it is relevant when assessing the presence of animus.

On August 29, Matt Mapes, who had been with the May 2 group, appeared at the Tann Electric offices with four other union members, none of whom had been present on May 2. All five filled out applications and left. The applicants who appeared with Mapes were Allan Ward, who has 19 years electrical experience, including 1 year in service work, Harvey Henry, who has 35 years of experience and has performed service work on three different occasions,[11] Clint Klinge,[12] and Frank Matthews whose application reflects that he is self employed as the owner of Frank Matthews' Electrical Service.[13] All indicated on their applications that they were available for immediate employment. All received letters stating that the Company was "unable to offer you a position at this time, but we will keep your application on file for future reference."

Tann did not want anyone working for him who behaved in "a harassing, intimidating manner" which, he testified, was his perception of the first visit. He acknowledged that he did not consider for hire any of the union applicants who applied on August 29 because they "were part of the first [May 2] group." Tann was incorrectly informed that "some of the same people" who had been in the May 2 group had been in this group. He did not compare the names on the applications. Had he done so he would have discovered that Mapes was the only duplicate.[14]

On September 3, David Johnson went to a second interview with Tann, following which he was sent for a physical exam and drug test. He passed both and was hired. He was to report to work the following morning. On returning home on September 3, Johnson called Union Business Agent Beem. "He [Beem] told me to get a tape recorder and go back in there and tell them that I quit."[15]

Johnson's refusal of Respondent's offer of employment left open the position vacated by Drummond. Tann continued to seek to fill this vacancy. He interviewed Lonnie Golden, who had filled out an application on September 11 and 20. Golden was not offered a position.[16]

Electrician Ron Jarrett ceased work in late September or on October 1 or 2.[17] Although this appeared to create a second vacancy, payroll records reflect that Respondent thereafter only sought to maintain a crew of four fully qualified electricians. On October 2 or 3, nonunion electrician Tom Jackson applied and was hired, but his employment ended within the month.[18] On November 29, nonunion electrician Kelly LaBelle applied and was hired. LaBelle worked for a few days in early December.[19] In late 1994 and early 1995, John Tann performed some service work, as did his father, Francis Tann. Thus, Respondent operated with four electricians, Richey, Neal, Ruegsegger, and, intermittently, Francis Tann, and two shopmen. If Respondent had hired one of the qualified union applicants who applied on August 29, Respondent would have had a crew of four electricians, the maximum number of fully qualified electricians that Respondent's payroll records reflect were employed from November 1994 until May 1995. There was not another vacancy until May 1995. Respondent hired a second shopman, Kelly Gardner, who applied for work on December 27. His name first appears on the January 8, 1995 payroll.[20]

At a meeting, the date of which is not established, Richey, Ruegsegger, and Neal, the three journeymen employed by Tann, requested a pay raise, but Tann refused.[21] In discussing this matter, someone made a comment about joining the Union, and Tann commented that he would strap his tools back on and "we probably wouldn't be working for him."[22]

Ruegsegger and Neal left Respondent in early May 1995. Richey was discharged in late June or early July 1995. Electrician John Stegner was hired and began work in late July 1995, and electrician Tony Karr was hired and began working in late August or early September 1995. There were no contemporaneous applications from union members at the time these individuals were hired, but Respondent has no time limitation upon its applications. Although Tann does not regularly review prior applications, he sometimes does so as is established by his hiring of Stegner. Stegner had applied for work on October 5, 1994, and he was interviewed on October 5. Tann notes on the application that "his experience may be a little weak—he makes a good impression." Stegner was not offered a position at that time. The top of the application bears the word "regret," Tann's direction that a letter be sent advising that a position was not able to be offered at that time. In July 1995, Stegner was hired. Thereafter Karr, who applied on July 31, 1995, was hired. Respondent continued to accept applications until No-

[11] Tann noted on Henry's application that his last three jobs, from which Henry was laid off, were all of short duration. There was no way, given the format of the application, that Henry could reveal his service work. I note that it was at the interview between Tann and Johnson that Tann learned of Johnson's work with Guy's Foods, the firm similar to the one in Denver, and Tann considered this to be Johnson's most significant experience. Johnson's application did not reflect that he had worked at Guy's Foods.

[12] Klinge's application is incomplete in that it does not show his pay rates.

[13] The record does not reflect whether this is an electrical service company, like Respondent, an electrical repair shop, or some other type of enterprise.

[14] Tann testified that his receptionist reported that one of the applicants had pointedly stared at her; however, that individual was not identified. The receptionist did not testify.

[15] The foregoing quoted statement, which I credit, is from Johnson's affidavit. I specifically discredit the testimony of Johnson and Beem that would attribute Johnson's action to a conversation with his wife. Although that is the story he concocted and told to the Respondent, his affidavit is explicit. No conversation with his wife on September 3 is mentioned. He went home, called Beem, and was told to quit. In view of Beem's lack of candor regarding this incident, I am unable to determine whether the direction given to Johnson to quit was to assure that there was a position available for at least one of the five union applicants who had filled out applications on August 29 or for some other purpose. In regard to another purpose, I note that Johnson, when informing Respondent that he quit, apologized for wasting the $100 that Respondent had spent on Johnson's physical exam.

[16] The interview notes reflect that Golden disregarded the no smoking sign.

[17] Jarrett appears on the payroll ending October 2, but not on the payroll ending October 16.

[18] Jackson was a class A electrician. His experience was with Olin and GAF, not an electrical service company.

[19] LaBelle had been performing service work for a company in New Mexico.

[20] Gardner was hired as a shopman, but with an expectation that he would develop quickly, which he did.

[21] The identity of the electricians and the presence of two persons to whom Richey referred as apprentices are consistent with an early 1995 date.

[22] This comment is not alleged as a violation of Sec. 8(a)(1) of the Act, and Richey could not recall the date of this meeting at which it was made. Tann did not deny the comment, and I find it relevant in assessing the presence of animus.

vember 8, 1995. No union members applied during the period from August 29, 1994, until July 22, 1996. A shopman, Mark Monnington, was hired in March 1996.

On July 22, 1996, union members Mapes, Mike Damico, Bernie Devine, and Glen Mallott went to Respondent's offices to apply for work. Damico and Devine were wearing shirts with union insignia. Mapes identified himself as an organizer with the Union and the other applicants as members of Local No. 124. When Mapes advised that they would like to apply for a job, the receptionist informed him that Respondent was not taking applications and not hiring, but they could leave their names and phone numbers. An unidentified male approached from a side office and the receptionist informed him that the applicants were leaving their names for the possibility of future contact. The unidentified male indicated that was not really necessary since Respondent was not hiring at that time. In further conversation the unidentified male stated that Respondent hired through referrals, "but was always willing and would talk to qualified people." There is no evidence of any vacancy on July 22, 1996, and there has not been a vacancy for an electrician since that date.[23]

C. Analysis and Concluding Findings

1. The 8(a)(1) allegations

The complaint alleges that Tann, about August 26, interrogated applicants concerning their union membership. The evidence in support of this alleged violation consisted of the testimony of David Johnson who, as discussed above, was interviewed on August 29. I have not credited his testimony and, therefore, this allegation shall be dismissed.

The complaint, as amended, alleges that since at least July 22, 1996, Respondent established, maintained, and applied to employee applicants a hiring policy and practice that screened employee applicants to uncover suspected union supporters. There is no evidence regarding any policy that screened applicants to uncover suspected union supporters. Respondent did, after August 29, 1994, cease its practice of advertising to "screen the market."[24] After November 1995 Respondent began accepting applications only when it had positions to be filled. Counsel for the General Counsel, in her brief, argues that Respondent changed its hiring policies to avoid considering applicants with union affiliation. In this regard she cites *Casey Electric,* 313 NLRB 774, 775 (1994), in which the respondent shifted the locus of hiring from its Winchester, Virginia jobsite, where the union affiliated applicants were seeking to apply, to Jackson, Tennessee, and did not advise the union electricians about the new locus of hiring. Counsel also cites the case of *D.S.E. Concrete Forms,* 303 NLRB 890, 897 (1991), in which a signup roster was not made available to union applicants. I am aware of no authority, and the General Counsel has cited none, that requires an employer to bear the expense of advertising available positions when it has job openings. An employer may lawfully refuse to accept applications when it has no job vacancies. *Delta Mechanical, Inc.*, 323 NLRB 76 (1997). There is no evidence of any vacancy on July 22, 1996. The applicants, on July 22, were told by an unidentified person that Respondent "was always willing and would talk to qualified people."[25] There is no evidence that nonunion applicants were treated any differently. No union member had sought employment with Respondent since August 29, 1994, almost 2 years previously. Unlike the cases cited by the General Counsel, there is no evidence that Respondent's November 1995 decision to cease accepting applications when it had no vacancies was to avoid hiring union members. The General Counsel has not adduced evidence of a discriminatory motive and has not carried the burden of proving that Respondent established, maintained, and applied a hiring policy and practice that screened employee applicants to uncover suspected union supporters.

2. The 8(a)(3) allegations

The complaint alleges the unlawful failure of Respondent both to consider for hire, and the refusal to hire, the alleged discriminatees: Kevin McConnell and the 15 who applied on May 2, the 5 who applied on August 29, 1994, and the 4 who sought to apply on July 22, 1996.[26] The charge here was filed on January 23, 1995, thus, the 10(b) date is July 23, 1994. With regard to the May 2 applicants, no violation can be found until July 23. A discriminatory failure to consider for hire constitutes a violation of the Act. *Eldeco, Inc.*, 321 NLRB 857, 870 (1996). The existence of a vacancy is, of course, necessary to establish a discriminatory failure to hire and a backpay obligation. Ibid.

There is no evidence that Respondent had any vacancy on May 2 when McConnell and, thereafter, the 15 union members applied in a group for the single position of "Electrician, 4+ years of experience a plus" pursuant to Respondent's May 1 advertisement. Tann credibly testified that the purpose of the advertisement was to screen the market. Respondent had one vacancy as of July 23; the position vacated by employee Drummond. Although Tann testified that it was not his practice to review prior applications, the record establishes that, although Stegner had applied in October 1994, he was not hired until July 1995. Thus, at least on occasion, Tann did review prior applications.

Tann testified that, following the May 2 taping incident, he decided that he did not "want to employ anybody that would go out and . . . be insubordinate to me or to my customers in the manner in which . . . they behaved themselves at that time."[27] On receiving the report that a group had submitted applications on August 29, and that the group included "some of the same people" who had been in the May 2 group, Tann did not consider any of them because they "were part of the first [May 2] group."

In addressing Tann's refusal to consider for hire, after July 23, the applicants who applied in a group on May 2, I shall utilize the analytical framework set out in *Big E's Foodland,* 242 NLRB 963, 968 (1979), in which the Board noted the elements of (1) the employment application by each alleged discriminatee, (2) the refusal to hire each, (3) a showing that each was or might be expected to be a union sympathizer or sup-

[23] Respondent placed a shopman, Philip Bux, who is involved in constructing the Tann's home, on the company payroll as of November 24, 1996. Testimony reveals that Bux spends less than 20 percent of his time working for the Company; "the guy works at the house."

[24] The cessation of this advertising is not alleged as a violation.

[25] Contrary to a statement in General Counsel's brief, there is no evidence that Tann hired only persons already known to him. When asked by the General Counsel if it were true that Tann took applications only from individuals known to him or other Tann employees, Tann replied, "That is incorrect."

[26] Mapes was in all three groups.

[27] The General Counsel's brief is incorrect when it states that the only reason given by Tann for refusing to hire these applicants was that "they came as a group and had a spokesman."

porter, (4) a showing that the employer knew or suspected such sympathy or support, (5) that the employer maintained animus against such support, and (6) that the employer refused to hire or, in the instant case, consider for hire the applicants because of such animus. Regarding the final element, under *Wright Line*,[28] the Respondent can rebut the General Counsel's prima facia case by showing that, notwithstanding the protected conduct, it would have taken the same action.

There is no issue regarding the application and refusal to consider these applicants, all of whom were union members and had been identified as union members to Respondent. Although I have not found an independent 8(a)(1) violation, Tann's comments to Petrie and the suggestion to Richey that, if his employees were to unionize he would strap on his tools and they would probably not be working there, reveals animus.

Tann testified that he decided that he did not have to employ anybody that "would go out and . . . be insubordinate to me or to my customers," referring to the behavior that occurred in the office on May 2. I am fully satisfied that Tann would not have considered any applicant, regardless of the group's identity, who applied as members of a group that disregarded the order of the building owner, continued to videotape a clerical employee after she had expressed her desire not to be videotaped, and defied the request of a police officer. The union spokespersons were acting in a representative capacity on behalf of the group. They requested the applications for the group. Although there was no profanity or physical violence, the obstinate refusal of the representatives of the Union to obey the requests made to turn off the video camera were intimidating. The continued taping of the clerical who stated she did not want to be taped was harassing.

The General Counsel argues that the videotaping was performed by the spokespersons, not the applicants, implying that the actions of the group leaders should not be attributed to the individual applicants. Thereafter, she inconsistently contends that the actions of the union members in applying for work constituted protected concerted activity. I need not address this contention since it is clear that the application process constituted union activity. In this regard, I find that the application process was a planned group activity. The applicants left the union hall identifying themselves to the operator of the video camera. No applicant attempted to disassociate himself from the group at any time. The applicants utilized a spokesperson to request applications on their behalf. Shortly after the police were called, Melloway handed the video camera to applicant Mapes in order to document the presence of Melloway and Lee, neither of whom submitted an application. I am unaware of any case authority that establishes that the actions of the Union were privileged. The Union recorded the movements of Respondent's clerical employees, one of whom had specifically objected to being videotaped. The continued videotaping after being requested to cease doing so by the owner of the premises and the defiance of a police officer, who was diligently trying not to cause a confrontation, is not protected conduct.[29] The continued taping of the clerical who stated that she had a problem with being videotaped without her permission is not privileged under the Act. Tann was not obligated to consider for hire, or to hire, applicants who, in the application process itself, chose to present themselves in a group, the leadership of which would not honor the request of his clerical employee, the direction of the building owner, or the request of a law enforcement officer. Melloway, at one point, stated that he would do only what spokesperson Lee told him to do. I find no violation of the Act with regard to Respondent's failure to consider for hire, or to hire, the 15 applicants of May 2.

Regarding the five applicants on August 29, Tann admitted that he did not consider any of them. He was incorrectly informed that "some of the same people" who had been in the May 2 group had been in this group and did not bother to compare the names on the applications. The only basis for concluding that these applicants "were part of the first [May 2] group" was their affiliation with Local No. 124. Only Mapes had been in the May 2 group. Notwithstanding my finding that Tann was justified in his refusal to consider the May 2 group applicants, which included Mapes, there were four applicants on August 29 who had no connection with that incident. Respondent cannot, for all time, lawfully refuse to consider all current or future members of Local No 124. By treating all of the August 29 applicants as if they had been involved in the May 2 incident, Respondent relied only on their union affiliation. By failing to consider union members Ward, Henry, Klinge,[30] and Matthews[31] for hire, Respondent violated Section 8(a)(3) of the Act.

Tann had interviewed Kevin McConnell, who was not a part of the May 2 group, and noted "probably would hire" on his application. McConnell was never offered a position. In view of the admitted failure of Tann to consider any of the applicants who appeared at his office on August 29, I find that he likewise did not consider McConnell.[32] The refusal to consider McConnell was based solely on his membership in the Union, since he did not participate in the May 2 incident. I find that the refusal to consider McConnell for available positions after July 23 violated Section 8(a)(3) of the Act.

On July 22, 1996, approximately 23 months after his last visit, Mapes again went to Tann Electric, this time with three different members. Respondent had new clerical employees, so Mapes was not recognized. Mapes identified himself as an organizer with the Union and the other applicants as members of Local No. 124. Nothing was said regarding unions or their union affiliation. The receptionist told them that Respondent was not accepting applications because there were no vacan-

[28] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[29] In *Delta Mechanical, Inc.*, supra at 80, the judge notes that the respondent had not instructed its personnel to demand that videotaping equipment be turned off when on its property and, if not turned off, that law enforcement officers should be called. In the instant case the request of the law officer was not obeyed.

[30] Although Klinge's application does not show his pay rates, the record refutes any contention that Respondent uniformly rejects all applications that contain unanswered questions. Gardner, who was hired as a shopman, left blank the questions relating to whether he had any disability or had ever been injured. *Brown & Root USA, Inc.*, 319 NLRB 1009, 1010 fn. 6 (1995).

[31] Matthews' application indicates both availability for immediate employment and self employment as the owner of Frank Matthews' Electrical Service. Matthews may well have decided that he did not wish to continue to deal with the day-to-day responsibilities inherent in operating a small business. His intentions regarding cessation of his self-employment can be determined at compliance.

[32] Tann had noted "probably would hire" on McConnell's application. Additional evidence supporting my finding that Tann lumped McConnell with the other union members and ceased to consider him for a position is Tann's hiring, in July 1995, of Stegner, who had been interviewed in October 1994. The comments on McConnell's application are more favorable than those on Stegner's.

cies, but they could leave their names and telephone numbers on a list. There is no evidence that nonunion applicants were treated any differently. The General Counsel presented no evidence of any disparity with regard to the application of Respondent's current policy of not burdening itself with applications when it has no positions. The record establishes that no new employee has been hired since March 1996. Absent evidence of an unlawful motive, an employer is not required to accept applications when it has no vacancies. *Delta Mechanical, Inc.*, supra. The General Counsel has not established that Respondent unlawfully failed to consider for hire, or to hire, the three applicants who accompanied Mapes to Respondent's office on July 22, 1996.

The General Counsel argues that there were seven or eight positions filled from July 23, 1994, until the present.[33] In making this argument she contends that persons called "shopmen" by Respondent should be treated as electrician positions. Her brief states that the term "shopman" is not used in any of Respondent's records or documents. Although this statement may technically be accurate, it does not take into account the testimony, confirmed by Respondent's records, that corroborate Tann's testimony that the individuals to whom he refers as shopmen are not fully qualified electricians. Respondent generally pays its shopmen $8 an hour, a nontechnical rate. This rate appears on payroll documents and was referred to in testimony as rate I. As shopmen gain experience they are sent out on jobs where they are paid a technical rate, rate II. Although the actual payroll records were not placed in evidence, counsel for the General Counsel examined payroll records and questioned Tann regarding them. Those records, consistent with Tann's testimony, showed that when a shopman was sent out on a job or performing technical work he was paid at a different rate, rate II, instead of the nontechnical rate, rate I. Tann testified that he has not hired journeymen for shopman positions. This testimony is uncontradicted and consistent with the record evidence regarding persons hired into this position. Thus, I reject the General Counsel's argument that shopman positions should be treated as electrician positions.[34] It is inconsistent with the record evidence and Tann's credible testimony.

As discussed in the facts section of this decision, the payroll summary establishes three vacancies, the vacancy that resulted from Drummond's departure in July 1994,[35] and the two vacancies that occurred when Neal and Ruegsegger quit in May 1995. Those vacancies were filled by Stegner and Karr. None of the five discriminatees was considered.

CONCLUSION OF LAW

By failing and refusing to consider for hire Kevin McConnell, Allan Ward, Harvey Henry, Clint Klinge, and Frank Matthews because of their membership in International Brotherhood of Electrical Workers, Local No. 124, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Discriminatees McConnell, Ward, and Henry testified at the hearing; Klinge and Matthews did not. I have rejected any contention that purported deficiencies reflected on the applications of Henry and Klinge contributed to Respondent's failure to consider them. Respondent did not consider the discriminatees because of their union affiliation, and I have found that this failure to consider violated the Act. In view of the situation involving David Johnson, there is an issue regarding whether employment, if offered, would have been accepted. Johnson was solicited by the Union to apply for work with the Respondent, and I have found that after accepting a job he was directed to quit. This scenario raises a question as to whether each of the five discriminatees, who also applied at the Union's behest, would actually have accepted a position if offered.[36] I shall leave this determination for compliance.

The violation I have found is a failure and refusal to consider for hire. Consistent with the Board's decision in *TIC–The Industrial Co., Southeast*, 322 NLRB 605 (1996), I shall leave for compliance the determination of which of the five discriminatees, if any, would have been selected for the vacancy that existed on July 23 and whether that applicant would have accepted the position. The record establishes that two additional vacancies occurred in early May 1995. Thus, it must also be determined which of the five discriminatees (or which of the four remaining discriminatees, assuming one is found to have been discriminatorily denied the July 23 vacancy), if any, would have been selected for the two vacancies that I find existed as of early May 1995 and whether the applicant(s) would have accepted the position(s).[37]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, Tann Electric, Mission, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to consider for hire applicants because they are members of International Brotherhood of Electrical Workers, Local No. 124.

[33] In determining available positions, the General Counsel states she did not count John Tann's father, Francis Tann, and his brother, Steven Tann, who began working in April 1996.

[34] I am mindful that, at the hearing, I noted that some electricians testified that they would work for as little as $6 an hour and that, if I credited that testimony, there could be a compliance issue regarding the shopman position. Thereafter, Tann reconfirmed earlier testimony that he had never hired a journeyman for a shopman position.

[35] If Respondent had hired McConnell or one of the four discriminatees who applied on August 22, and that individual had remained in Respondent's employment, assuming all else occurred as the records report, there would not have been another vacancy for an electrician until Neal and Ruegsegger left in May 1995.

[36] McConnell, Ward, and Henry all testified before David Johnson was called as a witness.

[37] If all of the discriminatees indicate that they would have refused the positions, the exercise of determining which of the five discriminatees would have been offered and accepted the positions will, of course, not be necessary. Since all of the discriminatees, when working pursuant to the union contract, would have earned wages in excess of what Respondent pays, there may be little backpay liability.

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer those of the employee-applicants named below who would currently be employed, but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

Harvey Henry	Clint Klinge
Frank Matthews	Kevin McConnell
Allan Ward	

(b) Make whole those of the employee-applicants named above who would have been employed, but for the Respondent's unlawful refusal to consider them for hire, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Mission, Kansas, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to consider for hire applicants because they are members of International Brotherhood of Electrical Workers, Local No. 124, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer those of the employee-applicants named below who would currently be employed, but for our unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

Harvey Henry	Clint Klinge
Frank Matthews	Kevin McConnell
Allan Ward	

WE WILL make whole those of the employee-applicants named above who would have been employed, but for our unlawful refusal to consider them for hire, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

TANN ELECTRIC

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."